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Millennium Maintenance & Electrical Contracting, Inc. and Local Union No. 3 International Brotherhood of Electrical Workers, AFL-CIO. Case 2-CA-35054

April 14, 2005

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS
LIEBMAN AND SCHAMBER

On September 10, 2004, Administrative Law Judge Raymond P. Green issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision* and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.

The principal issue presented here is whether the Respondent sustained its burden of proving that discriminatee Ilya Kleyn, unlawfully laid off by the Respondent on October 10, 2002, failed to mitigate backpay damages by making a reasonable search for interim employment.¹ The judge found that the Respondent did not sustain its burden in this regard. The Respondent excepts to the judge's finding. For the reasons that follow, we affirm.²

THE EVIDENCE

Kleyn, an experienced electrician, testified that beginning immediately after his layoff, he looked for work on a daily basis by searching newspapers and the Internet, by telephoning over 40 electrical contractors, and by sending his resume to contractors. Submitted into evidence in support of Kleyn's testimony were a copy of his resume and a calendar documenting his job search. When asked to recall names of contractors he contacted, Kleyn named 12, plus 2 others that eventually offered him employment. Kleyn also testified that he spoke weekly with Mitch Dakin, the shop steward for Local Union No. 3 International Brotherhood Of Electrical

Workers, AFL-CIO (Local 3 or the Union), to inquire about available employment. Dakin told him work was slow in the construction industry and that he would have to wait. Kleyn did not register with Local 3's job referral service. Local 3 Representative Ray West testified that unemployment in construction was unusually high in the New York area at the time Kleyn was laid off. West testified that unskilled construction workers were averaging 1 month to find employment, and more skilled workers (such as Kleyn) were averaging 4 to 5 months.

Kleyn received an offer from a nonunion employer on February 5, 2003, nearly 4 months after his layoff. A few days later, a Local 3 representative informed Kleyn of another job offer from a union employer. Kleyn accepted the latter offer.

Kleyn was an adherent of Local 3, which was seeking to replace the incumbent bargaining representative of the Respondent's employees. Local 3 Official Vincent McElroen spoke to those employees at an organizational meeting, which Kleyn also attended, in April 2003. Robert Lopez, the shop steward for the incumbent union, secretly recorded McElroen's remarks, which were, in relevant part, as follows:

That's the other thing I want to clear up . . . that Ilya got fired as you well know back in October. Alright. And we sat and spoke to Ilya about that. We could of put him out to work right away but we felt that Millennium did wrong and under the law. . . . if he went to work right away then the only thing that Millennium would be liable for is if they were found guilty of violating his rights, would be the difference. So let's say he was making \$500 with Millennium and he was making \$525 [with] Local 3—he would be entitled to nothing from Millennium. You see. Now, so what was decided was that no, you've got a good case and Millennium ought to have to cough something up in order to make that right. Okay. And what happened here where he's concerned—so we agreed that if he stayed out of work for 3 months, I think it was, or 4 months, alright, but was collecting unemployment during that whole period of time, so as long as he's getting unemployment we weren't feeling too guilty about it. We didn't feel great about what we were doing but we wanted Millennium to be in a position to where they owed him something.

Lopez testified that he saw Kleyn nod in an affirmative manner when McElroen said Millennium ought to pay. The judge neither credited nor discredited this testimony. He also neither credited nor discredited McElroen's testimony that his recorded statement was "puffery." However, based on the evidence as a whole and his observation of witness demeanor, the judge expressly credited Kleyn's testimony that he never entered into an agreement with any representatives of Local 3 to remain unemployed.

¹ The Board has already found that the Respondent violated Sec. 8(a)(3) and (1) by laying off Kleyn because of his protected activities. On July 22, 2003, Administrative Law Judge Joel P. Biblowitz issued a decision so finding. The Respondent did not file exceptions to Judge Biblowitz's decision. Consequently, his decision became the Board's. Sec. 101.11 of the Board's Rules and Regulations.

² The Respondent also excepts to the judge's finding that Kleyn did not refuse a valid offer of reinstatement in November 2002. We adopt the judge's finding. In doing so, Chairman Battista relies on the judge's crediting of Kleyn's testimony that no offer of reinstatement was made. Accordingly, the Chairman finds it unnecessary to pass on the judge's further finding that, if an offer was made, it was not valid.

ANALYSIS

In a backpay proceeding, after the General Counsel has shown the amount of gross backpay due, the respondent has the burden of establishing affirmative defenses to mitigate its liability, including willful loss of interim earnings. *Chem Fab Corp.*, 275 NLRB 21, 21 (1985), enf. mem. 774 F.2d 1169 (8th Cir. 1985). To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment. *Electrical Workers IBEW Local 3 (Fischbach & Moore)*, 315 NLRB 1266, 1266 (1995) (citing *Mastro Plastics*, 136 NLRB 1342 (1962), enf. in relevant part 354 F.2d 170 (2d Cir. 1965) cert. denied 384 U.S. 972 (1966)). It is the respondent's burden to demonstrate affirmatively that the discriminatee failed to exercise reasonable diligence in searching for work. *Id.* The discriminatee must put forth an honest, good-faith effort to find interim work; the law does not require that the search be successful. *Chem Fab Corp.*, supra. Doubts, uncertainties, or ambiguities are resolved against the wrongdoing respondent. *United Aircraft Corp.*, 204 NLRB 1068, 1068 (1973).

The Respondent has excepted to the judge's crediting of Kleyn's testimony that he did not enter into an agreement with Local 3 to not look for work. We will not overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951).

Applying the foregoing standard, we are not convinced that the judge erred in crediting Kleyn's testimony. Contrary to what the Respondent and our dissenting colleague assert, McElroen's recorded statement does not contradict Kleyn's denial that he agreed to remain out of work. McElroen's statement is ambiguous. He repeatedly referred to what "we" did or felt, but he never made it unambiguously clear that Kleyn was part of that "we." As used by McElroen, the word "we" can reasonably be interpreted to refer to McElroen and other Local 3 officials, *excluding* Kleyn. Indeed, that seems to be the more likely interpretation: "we sat down and spoke to Kleyn"; "so as long as he's getting unemployment we weren't feeling too guilty about it." Thus, we disagree with the dissent's contention that "[t]here is no dispute" that McElroen stated that "the Union and Kleyn agreed that Kleyn would remain unemployed." Rather, there is no dispute that McElroen stated that "we" agreed Kleyn would remain unemployed, but whether "we" included Kleyn is subject to doubt. That "we" *might* include Kleyn does not suffice: the evidence must clearly preponderate against the judge's credibility finding to overturn it. McElroen's ambiguous statement fails to meet that standard.³ In addition, McElroen's statement that

"we could of put him out to work right away," but chose not to do so, can reasonably be interpreted to mean that Local 3 would not refer Kleyn to signatories. Of course, the fact that Local 3 took that position simply means that a possible source of employment for Kleyn was not available, but that is not because of any decision by Kleyn.

Moreover, because McElroen's statement was ambiguous, so was Kleyn's affirmative nod in response to that statement (assuming he did in fact nod). Kleyn's nod may reasonably be interpreted as signifying his assent to the proposition that Local 3 officials agreed among themselves (but not with Kleyn) that Kleyn should not work. Additionally or alternatively, he might have been agreeing with the general sentiment that Millennium ought to have to pay, without also agreeing that he entered into a conspiracy to try to make it pay. Again, the evidence fails to preponderate against the judge's credibility finding.⁴

Notwithstanding the foregoing, the dissent points to evidence (or a lack of evidence) that supposedly corroborates Kleyn's complicity in the backpay scheme: sparse evidence supporting Kleyn's testimony that he looked for work; Kleyn's failure to register with Local 3's referral service; and the fact that Kleyn found a job 4 months after being laid off, at which time Local 3 also found him a job. This evidence also does not compel reversal of the judge's credibility finding.

First, the evidence of Kleyn's job search is not sparse. As discussed, when Kleyn was asked to identify contractors that he had contacted in his job search, he named 12. The Respondent had the opportunity to test the veracity of this testimony, but chose not to do so. The dissent asserts that Kleyn was "unable to name a single person with whom he spoke in connection with his applications." In fact, the Respondent never asked Kleyn to name anyone he spoke to in his search. Moreover, the fact that Kleyn received his first job offer from a nonunion employer corroborates his testimony that he searched for work.

Second, Kleyn's nonregistration with Local 3's referral service does not make it more likely than not that Kleyn agreed not to look for work. Kleyn denied knowledge of

McElroen's recorded statement amounts to an explicit admission that Kleyn agreed to remain unemployed. Our dissenting colleague objects to the judge's observation, stating that "the Board has not gone so far as to hold, at least expressly, that a Respondent can only satisfy this burden by securing an explicit admission from a discriminatee that he is not entitled to back pay." To be clear, we are not so holding. Rather, we find that the Respondent failed to meet its burden of proving willful loss because McElroen's ambiguous statement does not constitute clearly preponderant evidence contrary to the judge's crediting of Kleyn's denial that he agreed to remain unemployed.

⁴ The Respondent also argues that Kleyn's silence constituted an admission that he agreed with the Union to forego a job search. Again, however, McElroen never clearly said or unambiguously implied that Kleyn agreed with Local 3's plan. Kleyn's silence could not constitute an admission of something that was not stated.

³ In finding that the Respondent failed to meet its burden of proving willful loss of interim earnings, the judge observed that nothing in

the referral service, and concealment by Local 3 would be consistent with its determination to keep him unemployed. Even assuming Kleyn knew of the referral service, his nonregistration is unsurprising given the Union's opposition to his employment. Believing that union officials wanted him to stay out of work, Kleyn would have reasonably concluded that registering with the Union's referral service would have been futile at best.

Our colleague points to the fact that the Union waited 4 months to refer Kleyn to a job. But that would be consistent with McElroen's statement that the Union would refrain for 4 months from referrals. And, the fact that Kleyn was offered a nonunion job after 4 months is consistent with the fact that skilled construction workers in the area averaged 4–5 months to find work.

Based on the foregoing, we do not find that a clear preponderance of all the relevant evidence runs counter to the judge's partly demeanor-based decision to credit Kleyn's denial that he agreed to remain unemployed. The judge correctly found that the Respondent did not sustain its burden of proving that Kleyn failed to conduct a reasonable search for work. Accordingly, we will issue the following Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Millennium Maintenance & Electrical Contracting, Inc., New York, New York, its officers, agents, successors, and assigns, shall make whole the employee named below by paying him the total backpay amount set forth below, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholding as required by Federal and State laws. The Respondent shall also remit to the Local 363 United Service Workers, AFL–CIO, Annuity Fund the total contribution amount set forth below, plus additional amounts, if any, as prescribed in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

<u>NET BACKPAY</u>	
Ilya Kleyn	\$25,378.00
Dental Expenses	400.00
TOTAL BACKPAY	\$25,778.00
<u>CONTRIBUTION OWED</u>	
Local 363 Annuity Fund	\$1,480.00
TOTAL CONTRIBUTION	\$1,480.00
TOTAL AMOUNT DUE:	\$27,258.00

Dated, Washington, D.C. April 14, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting in part.

I join my colleagues in adopting the judge's finding that Respondent's ambiguous discussions with discriminatee Ilya Kleyn about future employment did not constitute an unconditional offer of reinstatement under Board precedent. Unlike my colleagues, however, I find the record evidence fully supports Respondent's contention that Kleyn failed to make reasonable efforts to mitigate his damages and, in fact, willfully incurred a loss of income during at least some portion of the backpay period. *Neely's Car Clinic*, 255 NLRB 1420 (1981); *High View, Inc.*, 250 NLRB 549, 550–551 (1980); *Aircraft & Helicopter Leasing Co.*, 227 NLRB 644, 646 (1976). In particular, the record evidence supports a finding of a tacit agreement between Local 3 and Kleyn that Kleyn would remain unemployed for 3 or 4 months in order to impose additional backpay liability on the Respondent. Thus, an award of backpay for that period serves no remedial purpose sanctioned by the Act.

Kleyn's Newspaper and Internet Job Search. Kleyn testified that upon his discharge he sent resumes to electrical contractors in response to help-wanted advertisements appearing in the newspaper and on the Internet. The General Counsel introduced a calendar prepared by Kleyn purportedly memorializing these efforts.¹ Kleyn's job search was otherwise uncorroborated. Kleyn produced no copies of correspondence with the employers to

¹ The General Counsel refused to produce Kleyn's calendar or other evidence of his mitigation efforts to Respondent prior to the hearing because of Respondent's "fail[ure] to cooperate" with the Region during the backpay investigation. Specifically, while Respondent advised the Region that it had a tape recording of a union meeting in which Local 3 representative Vincent McElroen told prospective members about the Union's agreement with Kleyn to stay out of work for 3 to 4 months, it declined to provide the tape to counsel for the General Counsel prior to the hearing. The Respondent claims it did not provide the recording because the Region asserted that it intended to proceed with the charge in any event.

The Board's Casehandling Manual requires the Region to disclose evidence discovered during the backpay investigation, such as a discriminatee's search for interim employment, provided the respondent cooperates during the investigation. *NLRB Casehandling Manual (Part Three) Compliance Proceedings*, Sec. 10622.6.

In my view, this provision should be invoked sparingly in cases, such as this, where the alleged respondent recalcitrance consists of refusing to voluntarily provide evidence that relates solely to an affirmative defense, and where the General Counsel could have, but did not, exercise his right to subpoena the evidence at issue.

whom he sent his resume, and was unable to name a single person with whom he spoke in connection with his applications.

Failure to Use Readily Available Sources for Interim Employment. Kleyn admitted that he never sought assistance in finding interim employment from the incumbent union nor did he utilize Local 3's job referral service—both readily available sources of replacement job opportunities. As to the latter, Kleyn claimed he was unaware of Local 3's job referral service, an implausible contention in light of the record.² First, Local 3's representative Vincent McElroen testified that most Local 3 members secure employment through the referral service, a fact an experienced union electrician such as Kleyn surely would have known. Second, McElroen testified that the Local 3 job referral service was discussed and promoted at various union meetings after Kleyn's layoff. Third, even if the common experience of his fellow union members and the information conveyed at union meetings somehow eluded him, Kleyn claimed that he spoke weekly with Local 3 shop steward Mitch Dakin as part of his effort to secure interim employment. It defies credulity that a Local 3 shop steward would not have informed Kleyn, who was purportedly looking for work, of the mechanism through which most Local 3 members secured employment. Fourth, even if Dakin had been so remarkably remiss, McElroen purportedly spoke regularly with Kleyn and even instructed Union Official Ray West to personally assist Kleyn in finding employment in November 2002. Yet, despite the personal involvement of these various Local 3 officials, nobody told Kleyn about the primary vehicle through which the Union's members find work. The most logical conclusion from the record facts is that Kleyn knew of this readily available and historically successful method of obtaining employment, and willfully failed to avail himself of it; conduct entirely consistent with a design to remain unemployed in order to impose back pay liability on Respondent.

The Agreement Not to Find Work. There is no dispute that during an April 2003 union meeting with Respondent's employees McElroen openly stated that the Union and Kleyn agreed that Kleyn would remain unemployed for 3 or 4 months in order to impose additional backpay liability on the Respondent. There is no dispute as to this fact because the meeting, unbeknownst to McElroen at the time, was secretly tape recorded. A transcript introduced at the hearing reflects that McElroen, with Kleyn present, told the employees (emphasis added):

That's the other thing I want to clear up . . . that Ilya got fired as you well know back in October. *And we sat and spoke to Ilya [after his firing] about that. We could of put him out to work right away but we felt that Mil-*

² The judge neither credited nor discredited this portion of Kleyn's testimony.

lennium did wrong and under the law . . . if he went to work right away then the only thing that Millennium would be liable for is if they were found guilty of violating his rights, would be the difference. So let's say he was making \$500 with Millennium and he was making \$525 [with] Local 3—he would be entitled to nothing from Millennium. You see. *Now, so what was decided* was that no, you've got a good case and Millennium ought to have to cough something up in order to make that right. Okay And what happened here where he's concerned—*so we agreed that if he stayed out of work for 3 months, I think it was, or 4 months*, alright, but [he] was collecting unemployment during that who [sic] period of time, so as long as he's getting unemployment we weren't feeling too guilty about it. *We didn't feel great about what we were doing but we wanted Millennium to be in a position to where they owed him something.*

Robert Lopez, the individual who tape recorded the meeting, testified that “when McElroen made the above statements, all the people at the meeting looked at Kleyn who nodded his head in an affirmative manner.” The judge did not discredit this testimony on demeanor or other grounds.

When confronted on cross examination about whether his statements during the April 2003 meeting were true, McElroen replied: “You'd have to define the truth.”³

Notwithstanding the plain import of the undisputed text of McElroen's comments, the judge found that Respondent had failed to meet its burden of demonstrating that Kleyn either failed to exercise reasonable diligence to search for work or that he willfully incurred a loss of income, apparently because “nothing [in the transcript] amounts to an explicit admission by McElroen or Kleyn that Kleyn had agreed . . . to forego a job search for the purpose of imposing a monetary liability on the Respondent.” Though I recognize that the Respondent bears the burden of proof in demonstrating a failure to mitigate, and that doubts must be resolved against the wrongdoer, the Board has not gone so far as to hold, at least expressly, that a Respondent can only satisfy this burden by securing an explicit admission from a discriminatee that he is not entitled to backpay.

³ Q. When you were making these statements to the guys that you were organizing from Local...Local 3, for Millennium, were you telling them the truth?

A. You'd have to define 'truth.'

....

Q. Did you . . . did you say the things on this page on this . . . in that tape?

A. Yes, I did.

Q. Did you mean them?

A. Yes, I did.

Q. As far as you know, to the best of your ability, were you telling them the truth?

A. You have to define it.

Transcript 149–150.

If McElroen's uncontested statements stood alone in the face of compelling evidence of reasonably diligent efforts on Kleyn's part to find interim employment, I might be persuaded to my colleagues' view. However, McElroen's statements do not stand alone. Corroborating McElroen's description of the existence of the agreement is the sparse evidence of Kleyn's mitigation efforts and the fact that Kleyn never availed himself of, and was supposedly never told about, the most common method through which Local 3 members found work.⁴ Also corroborating an agreement as described by McElroen is the fact that Local 3 secured a job offer for Kleyn at union scale 4 months, *nearly to the day*, after his layoff, and on the very same day that Kleyn reported telling the Union of another offer from a nonunion employer.

Against this tide of coincidence, teeters the obviously self-interested testimony of Kleyn and McElroen that there was no agreement; that McElroen's statements were "mere puffery." In *Standard Dry Wall*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951), the Board held that since it engages in a *de novo* review of the record, it is not bound by a trial examiner's findings. Nevertheless, "it is our policy to attach great weight to a trial examiner's credibility findings insofar as they are based on demeanor [and] not [to] overrule a Trial Examiner's resolutions as to credibility except where the clear preponderance of all the relevant evidence convinces us that the Trial Examiner's resolution was incorrect." *Id.* However, the judge here did not make an explicit credibility finding regarding McElroen's denial, and given McElroen's evasive insistence on a definition of "truth" when questioned about the agreement, his testimonial demeanor is certainly suspect. Similarly, while the judge stated that Kleyn "credibly denied" the existence of an agreement, he never explains the basis for this finding. Under these circumstances, and because McElroen's and Kleyn's testimony was inconsistent with the weight of the evidence, I would not defer to the judge's credibility findings, to the extent any were actually made. In my view, on this record, the Respondent successfully carried its burden of establishing that Kleyn failed to mitigate his damages and willfully incurred a loss of income during the 4-month period following his layoff. Consequently, I respectfully disagree with my colleagues and would deny backpay for that period.

⁴ On this record, I see little reason to credit Kleyn's essentially uncorroborated testimony concerning applications submitted to other employers. Indeed, keeping a calendar of such purported efforts is entirely consistent with the stated scheme to impose backpay liability on Respondent.

Dated, Washington, D.C. April 14, 2005

Peter C. Schaumber,

Member

NATIONAL LABOR RELATIONS BOARD

Darma A. Wilson Esq., and *Rita Lisko Esq.*, Counsels for the General Counsel.

Mark S. Mancher Esq., and *Steven S. Goodman Esq.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this backpay case in New York City on July 12, 2004.

The Board issued a Decision and Order in the underlying unfair labor practice proceeding on September 11, 2003. That Decision required the Respondent to make whole, with interest, the discriminatee, Ilya Kleyn for any loss of earnings that he suffered by reason of his unlawful layoff on October 10, 2002 and an unlawful reduction in his pay.

Based on the evidence as a whole, including my observation of the demeanor of the witnesses and after consideration of the Briefs filed, I hereby make the following findings and conclusions.

FINDINGS AND CONCLUSIONS

At the opening of the hearing the General Counsel amended the Backpay Specification to lower the amount of net backpay during the first quarter of 2003 from \$13,800 to \$9,962. Needless to say, the Respondent did not object. The total amount of net wage earnings claimed is \$25,378.

There is no dispute concerning the General Counsel's calculations regarding gross backpay and this is set forth in Appendix A to the Specification. The parties also stipulated that the amount due to an Annuity Fund on behalf of Kleyn would be \$1480. Finally, the parties agreed that the backpay amount should include \$400, which is the amount of out of pocket dental expenses that Kleyn incurred that would have been covered by the Respondent but for his layoff on October 10, 2002.

The parties agree that the backpay period commenced on October 10, 2002. The General Counsels assert that the backpay period ended on June 24, 2003, when it is conceded that the Respondent made a valid offer of reinstatement. As to interim earnings, the General Counsels conceded that Kleyn obtained employment starting on February 10, 2003, and they calculated his net backpay based on the difference between his gross earnings at the Respondent and the earnings he received after February 10, 2003. As noted above, the General Counsel, at the outset of the hearing, made an arithmetical correction, which reduced Kleyn's net interim earnings for the first quarter of 2003.

There are two issues raised by the Respondent. The first is whether Kleyn refused a valid offer of reinstatement made in or about November 2002. The second issue is whether Kleyn made a genuine effort to look for other employment during the backpay period.

There was testimony to the effect that at some point after his layoff, Kleyn phoned Respondent's owner, Marcelo Aspesi to

complain about some statements that were allegedly made about him to other employees in the Company. Aspesi claims that as part of that conversation, he told Kleyn that he might have another job coming up and asked if Kleyn would be interested in coming back. Aspesi asserts that Kleyn hung up without responding.

The record shows that the Respondent obtained a contract from MKG Construction and Consulting for a job at 99 Park Avenue, New York City. But that contract was signed well after the alleged offer was made to Kleyn. Further, the Respondent did not confirm this alleged employment offer in writing at any time either before or after the contract was signed. Kleyn credibly testified that he never received an oral offer of employment in connection with the 99 Park Avenue job or in the context of the phone conversation described above. Finally, I note that the record shows that there were settlement discussions that took place between the Respondent's attorneys and the Regional Office in November or December 2002, where the Company offered Kleyn a sum of money if he would waive reinstatement.

An oral offer of reinstatement can be valid. *Hoffman Plastic Compounds*, 314 NLRB 683 (1993). In this case, however, the Respondent has not persuaded me that it made a valid offer until June 24, 2003. The Respondent's own witness testified as to what would amount to, at best, a conditional offer for a job that might come up. Further, I credit Kleyn's testimony that no such offer was made.

Kleyn testified that after his termination by the Respondent he contacted Mitch Dakin, a shop steward for Local 3 who was involved in the organizing campaign. He states that Dakin told him that work in the industry was slow and that he would have to wait.

According to Kleyn, immediately after October 10, 2002, he undertook a search for work on his own by responding to ads in the newspapers and by utilizing the web site <http://www.hot-jobs.com>. Kleyn testified that he contacted many electrical contractors and supply companies over the next 5 months but was unable to get an offer until February 5, 2003. And a few days after he received the offer, he also got word from Local 3 representative that he could go to work at a shop having a contract with Local 3. Faced with the two offers, Kleyn opted for the union job and went to work for JDF on February 10, 2003.

The Respondent claims that the Union, with the assent of Kleyn, entered into an agreement whereby Kleyn would remain out of work for 3 or 4 months so that the Respondent would be liable for at least that amount of backpay. In this regard, the Respondent points to a recording of a meeting that was held at the Union's office in April 2003 where Vincent McElreon spoke to some of the Respondent's employees. This recording was made by Robert Lopez who is an employee of the Respondent. (I note that Lopez was the shop steward for the rival union, Local 363 United Service Workers, AFL-CIO, and that he openly expressed his support for that Union as opposed to Local 3). In any event, the Respondent introduced into evidence a tape and transcript of a small portion of the meeting where McElreon spoke about Mr. Kleyn. The transcript, to the extent relevant here, reads as follows:

That's the other thing I want to clear up . . . that Ilya got fired as you well know back in October. Alright. And we sat and spoke to Ilya about that. We could of put him out to work right away but we felt that Millennium did wrong and under the law . . . if he went to work right away then the only thing

that Millennium would be liable for is if they were found guilty of violating his rights, would be the difference. So let's say he was making \$500 with Millennium and he was making \$525 Local 3—he would be entitled to nothing from Millennium. You see. Now, so what was decided was that no, you've got a good case and Millennium ought to have to cough something up in order to make that right. Okay. And what happened here where he's concerned—so we agreed that if he stayed out of work for 3 months, I think it was, or 4 months, alright, but was collecting unemployment during that who period of time, so as long as he's getting unemployment we weren't feeling too guilty about it. We didn't feel great about what we were doing but we wanted Millennium to be in a position to where they owed him something.¹

According to Lopez, when McElreon made the foregoing statements, all the people at the meeting looked at Kleyn who nodded his head in an affirmative manner.

There is no dispute that McElreon made the statements described above. But he testified that he made them in the context of a much longer presentation where he was trying to show employees that despite claims by the rival union, Local 3 could exercise some real power. He testified that his statements that the Union decided to not get Kleyn another job was a bit of puffery made to demonstrate that if employees were discharged for their union activity, the Employer would be forced to suffer a monetary loss.

McElreon testified that he did not make any agreement with Kleyn that the latter should not look for or accept other employment. He testified that, in fact, an inordinate number of Local 3's members were out of work in the fall and winter of 2002 as a result of the economic recession that hit New York particularly hard. McElreon testified that he could not have gotten Kleyn a job anyway.

Similarly, Kleyn credibly denied that he ever made such an agreement with any representatives of Local 3. He testified that he did in fact diligently look for work after his layoff on October 10, 2002.²

The recording is intriguing. But a close listening of the recording shows that there is nothing that amounts to an explicit admission by McElreon or Kleyn that Kleyn had agreed, back at the time of his layoff, to forego a job search for the purpose of imposing a monetary liability on the Respondent.

Once the General Counsel has shown the gross backpay due in the Specification, the Employer has the burden of establishing affirmative defenses which would mitigate its liability, including willful loss of earnings and interim earnings to be

¹ The transcript goes on and McElreon describes a different transaction involving an article 20 proceeding at the AFL-CIO in Washington, (where Kleyn was asked to be a witness by Local 3), and after which, there were settlement discussions between the Respondent and the Regional Office in relation to the charge and Kleyn's discharge. McElreon told the employees at the April meeting that although the Employer offered a sizeable amount of money to Kleyn, its lawyers insisted on a waiver of reinstatement that Kleyn, with the gratitude of the Union, refused to waive. McElreon pointed out that Kleyn's decision to insist on reinstatement would mean that he could vote in the election if he won the unfair labor practice case and that "he made a sacrifice is what it comes down to." As the article 20 proceeding took place in late October or early November 2002, the settlement discussions must have taken place at a somewhat later time.

² Kleyn testified that he was unaware that there was a union/employer referral service and that he didn't register for employment there.

deducted from the backpay award. *NLRB v. Brown & Root*, 311 F.2d 447, 454 (8th Cir. 1963); see also *Sioux Falls Stock Yards Co.*, 236 NLRB 543 (1978). Respondent does not meet its burden of proof by presenting evidence of lack of employee success in obtaining interim employment or of so-called “incredibly low earnings, but must affirmatively demonstrate that the employee did not make reasonable efforts to find interim work.” *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575–576 (5th Cir. 1966).

In backpay cases, the discriminatee is required to make a reasonable search for work to mitigate backpay. *Lizdale Knitting Mills*, 232 NLRB 592, 599 (1977). But he or she is only required to make reasonable exertions, not exercise the highest standard of diligence. The Act does not require that a search be successful; only that it be an honest good-faith effort. The burden of proof is on the Respondent to show that a claimant has failed to make an effort or that he or she willfully incurred losses of income or was otherwise unavailable for work during the backpay period. *NLRB v. Pugh & Barr, Inc.*, 241 F.2d 588 (4th Cir. 1956). Where there are doubts, they are resolved in favor of the discriminatee and not the Respondent, which is the wrongdoer. *United Aircraft Corp.*, 204 NLRB 1068 (1973). In

determining whether a good-faith effort was made the Board may consider all his circumstances including the economic climate in which the individual operates his skills and qualifications, his age and his personal limitations. *NLRB v. Madison Courier Inc.*, 472 F.2d 1307 (D.C. Cir 1972)

In view of all the foregoing, I shall recommend the issuance of the following

ORDER

The Respondent, Millennium Maintenance & Electrical Contracting, Inc. shall pay the following amounts to or on behalf of Ilya Kleyn.

Net Backpay	\$25,378.00 plus interest.
Dental Expenses	400.00.
Local 363 Annuity Fund	1480.00 plus interest. ³

Dated Washington, D.C. September 10, 2004

³ Pursuant to *Merriweather Optical Co.*, 240 NLRB 1213 (1979), interest on the payments to the Annuity fund are governed by the interest rates established by the appropriate trust document.